

Issues: Group II Written Notice (failure to follow instructions), and Termination due to accumulation; Hearing Date: 01/11/17; Decision Issued: 01/12/17; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10908; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 01/27/17; EDR Ruling No. 2017-4490 issued 02/14/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10908

Hearing Date: January 11, 2017

Decision Issued: January 12, 2017

PROCEDURAL HISTORY

On October 17, 2016, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions.

On October 19, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 15, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 11, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Old Dominion University employed Grievant as a Housekeeper. She had been employed by the Agency for approximately 15 years.

Grievant had prior active disciplinary action. On June 17, 2013, Grievant received a Group III Written Notice with a five work day suspension because she was found in a room with the lights off, wrapped in a blanket, and with a space heater turned on. Following that incident, the Supervisor and Manager instructed Grievant that she could not have a space heater with her. Grievant understood the instruction.

The Agency's fire regulations prohibit use of space heaters by employees in the Agency's buildings.

On September 14, 2016, Grievant took a break in a lab/office. The room was cold to her and she used a space heater and blanket to keep warm. When confronted with her action on September 14, 2016, Grievant stated she had been going into the room when no one was using it and that "[o]ne day it was so cold in there that I asked [another person] if I could use her heater and was going to return it the next day."

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Failure to follow a supervisor’s instructions is a Group II offense.² Grievant was instructed not to use a space heater in the building. On September 14, 2016, Grievant borrowed a space heater and used it while she was taking a break. Her actions were contrary to the instructions she received from the Supervisor and Manager. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Upon the accumulation of an active Group III Written Notice, any additional disciplinary action would justify removal. In this case, Grievant has accumulated a Group III Written Notice and a Group II Written Notice. Accordingly, the Agency’s decision to remove her must be upheld.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”³ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that her removal was too harsh to be appropriate disciplinary action. She pointed out that she has devoted 15 years to the Agency and her work performance was beneficial to the Agency as reflected in the letters of reference from key Agency employees that she submitted as evidence. She emphasized that she was honest when confronted by the Agency. The evidence showed that the Agency considered these factors prior to deciding what level of disciplinary action was appropriate. The Agency’s discipline was consistent with the level authorized by the Standards of Conduct. The Hearing Officer cannot conclude that the Agency has exceeded the limits of reasonableness. In light of the standard set forth in the Rules,

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.